Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

EXCEPTION TO SPECIAL MASTER'S REPORT OF JUNE 8, 1977 AND BRIEF IN OPPOSITION TO MOTION TO INTERVENE

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CITATIONS

Cases:

Kentucky v. *Indiana*, 281 U.S. 163, (173), (174), 74 L.Ed. 784, (797), 50 S.Ct. 275 (1930) 5

New York v. *New Jersey*, 345 U.S., 369, 97 L.Ed. 1081, 73 S.Ct. 689 (1953) 5, 6

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United States v. *Nevada*, 412 U.S. 534, 34 L.Ed.2d 132, 93 S.Ct. 2763 (1973) 6

Utah v. *United States*, 394 U.S. 89, 22 L.Ed.2d 99, 89 S.Ct. 761 (1969) 6

Rules:

Rule 24, Federal Rules of Civil Procedure 4, 5

Text:

4 American Law of Property, § 18.17 (A.J. Casner ed. 1952) 8

3 H. Tiffany, The Law of Real Property, § 938-49 (1939) 8

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EXCEPTION TO SPECIAL MASTER'S REPORT OF JUNE 8, 1977

Be it remembered that in the Supreme Court of the United States before the Honorable Oren Harris, Special Master, the following proceedings were had, to-wit:

Robert J. Foley, Phyllis K. Foley, and Oho Isaak (Intervenors) moved this Court that they be made parties to the above-entitled action as Defendants on the ground that Intervenors claim and defense in the main action has questions of

law or fact in common with those asserted by the Defendants and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. The Special Master, after considering the briefs of the parties, reported and recommended to the Supreme Court that an Order be entered granting Intervenors leave to file their complaint in intervention and that Intervenors be designated parties Defendant in the case.

To this report and recommendation of the Special Master, the Plaintiff takes exception and submits herewith it's brief in support of said exception.

Respectfully submitted,

STATE OF SOUTH DAKOTA, *Plaintiff,*

BY: _____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

BRIEF FOR PLAINTIFF IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

QUESTION PRESENTED

WHETHER THIS COURT SHOULD ALLOW PRIVATE INDIVIDUALS TO INTERVENE IN AN ORIGINAL ACTION TO DETERMINE A BOUNDARY BETWEEN TWO STATES WHEN THE PRIVATE INDIVIDUALS' STATE IS ALREADY A PARTY TO THE LITIGATION.

STATEMENT

Applicants, residents of South Dakota, have sought leave of this Court to intervene in the above-entitled action. In their motion, applicants have requested permission to intervene pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure which governs permissive intervention and they have further alleged in their motion that they are entitled to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedures. Applicants have asserted that they are the owners of the property involved in this boundary dispute and they seek leave to intervene for the purpose of protecting their ownership right.

This Court referred the Motion for Leave to Intervene to the Special Master, the Honorable Oren Harris. On the basis of the briefs submitted by the parties, the Special Master found that the proposed Intervenors should be permitted to intervene pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure. To the recommendation of the Special Master, the State of South Dakota has filed an exception.

ARGUMENT

MOTION FOR LEAVE TO INTERVENE SHOULD PROPERLY BE DENIED SINCE APPLICANTS DO NOT HAVE A COMPELLING INTEREST IN THIS PROCEEDING.

In opposition to applicant's motion, and the report and recommendation of the Special Master, the State of South Dakota submits that no compelling reason exists for permitting intervention by applicants, and in the absence of such a compelling reason, private parties, such as applicants, should not be permitted to intervene in an original proceeding before this Court involving two sovereign states. The State of South

Dakota further submits that in any event, leave to intervene should be denied as a matter of sound discretion in view of the nature of the relief sought by the present parties.

The propriety of allowing intervention by private parties in original actions has been considered by this Court on several occasions. In situations where a party, whose state is already a party to the litigation, has sought leave to intervene in an original action, the Court has consistently recognized that aside from the requirements of Rule 24 of the Federal Rules of Civil Procedure, the party must demonstrate some "compelling interest" in the litigation before he may be allowed to intervene.

In *New York* v. *New Jersey*, 345 U.S. 369, 97 L.Ed. 1081, 73 S.Ct. 689 (1953), the City of Philadelphia sought leave to intervene in an original proceeding in which the Commonwealth of Pennsylvania was already a party. The suit was originally brought to enjoin a proposed diversion of the Delaware River by the City and State of New York. It was conceded that the City of Philadelphia had an interest in the use of the Delaware water and thus an interest in the litigation. However, the court, in citing *Kentucky* v. *Indiana*, 281 U.S. 163, (173), (174), 74 L.Ed. 784, (797), 50 S.Ct. 275 (1930), recognized the principle that a state, "When a party to a suit involving a matter of sovereign interest 'must be deemed to represent all its citizens.' " The court then stated:

> The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties. *New Jersey*, *supra* at 373.

In conformity with this principle, the Court adherred to the rule enunciated in *Kentucky* v. *Indiana*, *supra*, that a proposed intervenor, whose state is already a party to an original proceeding, must prove a compelling interest in the litigation, in his own right, before his intervention may be allowed. On the basis of this rule, the Court denied Philadelphia's Motion for Leave to Intervene since it did not meet the burden of showing such a compelling interest.

The principles set forth in *New York* v. *New Jersey*, *supra*, limiting intervention in an original proceedings, were recently reaffirmed in *United States* v. *Nevada*, 412 U.S. 534, 37 L.Ed.2d 132, 93 S.Ct. 2763 (1973). In that case, this Court denied a motion by the United States for leave to file a complaint invoking original jurisdiction to determine water rights among the United States and two states. The Court denied the motion on the ground that the Federal District Court provided a more suitable forum to litigate the matter. In so ruling, the Court, citing *New York* v. *New Jersey*, *supra*, noted that private parties, with interest in the water rights in question, could participate in the litigation in Federal District Court, whereas they "ordinarily" would not be entitled to participate in their own behalf in an original action.

In *Utah* v. *United States*, 394 U.S. 89, 22 L.Ed2d 99, 89 S.Ct. 761 (1969), a question very similar to the present was presented to this Court. In that case, the State of Utah instituted an original action against the United States to determine ownership of certain lands within the State of Utah. By stipulation, the sovereigns agreed that Utah would not attempt to defeat the claim of the United States by proving that private land owners had superior title to the property in question. An individual who also claimed ownership of certain portions of the property sought leave to intervene to assert his ownership rights.

The Special Master found that the applicant satisfied the grounds for permissive intervention and concluded that if the matter were in Federal District Court, he would be permitted to intervene. However, the Special Master recommended that intervention be denied on grounds not ultimately considered by this Court.

In considering this matter, the Court did not question or discuss the Master's finding that the proposed intervenor satisfied the requirements for permissive intervention. The Court instead placed emphasis on the fact that pursuant to the stipulation between the sovereigns, private ownership claims were not in issue. Since ownership was not an issue, the Court concluded that there was no compelling reason to allow intervention by the property owner and leave to intervene was denied.

In the present proceeding as well, no compelling reason exists for permitting intervention by the private land owners. The proposed Intervenors are South Dakota citizens and their sole alleged interest in this boundary dispute is the protection of their title to the property in question. However, the present suit was brought for the limited purpose of asserting and determining the boundary between two sovereign states. Neither state is claiming ownership of the disputed property in this proceeding and ownership is not an issue in any way.

In reality, Intervenors have no interest in this proceeding since the outcome will not directly effect ownership of their property in any way. Title could be affected if Intervenors claimed ownership on the basis of a grant from the State of Nebraska. Clearly, if this Court found that the property was never located within the State of Nebraska, any patent issued by that state would be null and void. However, Intervenors' claim of ownership is derived from a federal patent. It is a

universally accepted rule that where a title is derived from the federal government, the validity of title is not affected by a determination that the property lies on one side or the other of an interstate boundary. 4 American Law of Property, § 18.17 (A.J. Casner ed. 1952); 3 H. Tiffany, The Law of Real Property, § 938-49).

Intervenors apparently contend that their ownership may be indirectly affected by the decision of this Court since if the disputed areas are declared to be within the boundaries of South Dakota, the State of South Dakota may be able to assert ownership in subsequent proceedings. However, Intervenors' claim of ownership should properly be determined in the state courts. Should Plaintiff prevail in the present suit, it would then be necessary to conclude a quiet title action already pending in the state courts of the State of South Dakota to determine ownership. In the state court proceedings, Intervenors can assert their claim of ownership and, aside from jurisdiction, nothing decided by this Court in the present proceeding will have any bearing on the issues presented therein.

In view of the foregoing, the State of South Dakota submits that the applicant's claim of interest can be catagorized as a mere preference that the property be declared a part of the State of Nebraska in order to assist them in asserting ownership rights in the appropriate state courts. Such an indirect interest does not provide the "compelling reason," within the purview of the heretofore cited cases necessary to permit intervention by a private party in this original action between two states.

The heretofore cited cases (wherein intervention by private parties in original proceedings has been limited) have not been concerned with boundary disputes between states. With respect to boundary litigation, substantial reasons are present in the very nature of the action for denying intervention.

In *Rhode Island* v. *State of Massachusetts*, 37 U.S. 657, (748), 9 L.Ed. 1270, 12 Pet. 747 (1838), the United States Supreme Court, at a very early date, exhibited a clear disinclination to permit participation by private parties in boundary litigation. In that boundary dispute between two states, the argument was advanced, as here, that the inhabitants of the property in dispute should be made parties to the suit. In summarily rejecting that argument, the court stated:

> It might with the same reason be objected, that a treaty or compact settling boundary required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void; as the authority to make it was derived from the legislative power only.

In accordance with the logic set forth in the Rhode Island decision, the ascertainment of the boundary between two states is a sovereign function which should be exercised by the state involved without interference from private individuals motivated by personal goals. To allow intervention by private parties in this boundary litigation would, in effect, allow citizens to participate in a significant sovereign function on an equal basis with the sovereign states involved. It would also permit impeachment of the sovereign policy of the State of South Dakota by its own citizens. Thus, in the exercise of sound discretion, intervention by private parties should properly be denied in boundary litigation due to the very nature of the proceeding.

CONCLUSION

In the present case, no substantial reason has been urged by the proposed Intervenors for allowing their intervention in this matter. Furthermore, they have asserted no substantial interest in this litigation. Their limited interest is nothing more than a mere preference that the property be declared a part of the State of Nebraska to assist them in asserting ownership rights in the appropriate state courts. Such an interest is not the compelling interest required to intervene in an original action before this Court. Moreover, due to the very nature of boundary litigation, substantial reasons exist for denying intervention.

Dated at Pierre, South Dakota, on this 19th day of July, 1977.

Respectfully submitted,

STATE OF SOUTH DAKOTA, *Plaintiff,*

BY: _____

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Assistant Attorney General
State of South Dakota
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Pierre, South Dakota 57501
Telephone: (605) 224-3215

Attorney for Plaintiff.

CERTIFICATE OF SERVICE

Service of Exception To Special Master's Report Of June 8, 1977 and Brief In Opposition To Motion To Intervene was made this 19th day of July, 1977, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the following individuals:

Paul Douglas	Everett J. Bogue
ATTORNEY GENERAL	Attorney at Law
State Capitol	Box 435
Lincoln, Nebraska	Vermillion, South Dakota 57069

In addition, I hereby certify that all parties required to be served have been served.

Dated this 19th day of July, 1977.

DONALD D. FOREMAN
Assistant Attorney General
State of South Dakota